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# Border Management in Europe: Is the Paradigm Evolving?

By Nadav Morag



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## Abstract

*This article focuses on the European Union's approach to border management. The concept of border management includes not only: 1) the physical control over borders and the flow of goods and persons through ports of entry; but also 2) the management of immigration, migrant flows, and asylum request; as well as 3) the combatting of cross-border threats. This article will explore existing European policies and structures as well as recent policy changes in select areas of border management in order to understand some of the fundamental aspects of Europe's evolving approach to managing and safeguarding its internal and external borders. It argues that fears of migration and cross-border security threats have led to a shift in the EU paradigm for managing its internal and external borders, particularly with respect to border controls and managing the asylum process.*

## Introduction

The European Union (EU) member states and a handful of affiliated countries share the world's most extensive border management regime. The concept of border management, usually exclusively associated with the physical control over borders and the flow of goods and persons through ports of entry, also deals with the management of immigration and of the mitigation of cross-border threats including criminal activity and terrorism. Since the onset of the European migrant crisis from the Middle East and North Africa in the wake of the outbreak of the Syrian civil war and the collapse of Libya (both in 2011), there have been some dramatic shifts in the border management policies of some EU member states. This has brought into question whether it is possible to turn back the clock, given the comparative drop in migration rates since the height of the crisis in 2015, or whether the changes instituted by a range of member states, and being considered by others, will fundamentally change the manner in which borders are managed in Europe.

We will explore existing European policies and structures as well as recent policy changes in select areas within each of the three aforementioned aspects of border management in order to understand some of the fundamental aspects of Europe's evolving approach to managing and safeguarding its internal and external borders. More specifically, we will look at issues pertaining to the status of the Schengen area and control of external borders with non-EU/Schengen countries, the management of immigration within the European Union and its member states, and the EU role in combatting cross-border threats.

From the perspective of American policymakers, one reason to analyze homeland security-related issues (such as border security) overseas is the opportunity to explore alternative policy approaches to solving roughly comparable types of problems. This may help U.S. policymakers avoid replicating mistakes made overseas and avoid having to "reinvent the wheel" when policy

ideas implemented overseas prove fruitful. Ideally, this research will also stimulate thought about potential policy directions and/or areas of exploration in the ongoing quest to improve American border security and immigration policies.

## Literature on Border Management in Europe

The topics related to border management and immigration in the European context have been addressed widely in the scholarly literature on border and migration studies, though much of the more recent literature focuses less on policy, strictly speaking, and more on geospatial, political, or cultural aspects of European borders and border regimes. For example, from a geospatial perspective, Bellanova and Duez look at the European Border Surveillance (EUROSUR) project in the context of the Mediterranean and look at how the concept of a border has changed and what constitutes an “area of control.”<sup>1</sup> Other scholars, such as Longo, argue that borders should not be viewed just as specific locations but rather as “...thick, multifaceted, and binational institutions...”<sup>2</sup>

From a political perspective, Jeandesboz focuses on the political messaging of EU border control activities and, in particular, the manner in which EU actions are justified to the public.<sup>3</sup> Vaughan-Williams, on the other hand, looks at the competing discourses of ‘humanitarization’ and ‘securitization’ in influencing political activity.<sup>4</sup> Beznec argues that the EU has created a ‘crisis of territoriality’ in member states that has necessitated creating a new political and conceptual framework of the border.<sup>5</sup>

Among the studies of border culture in the European context, Zaittoi suggests that there is a culture of border control in Europe which shapes how problems are viewed, the choice of actors involved, and the determination of which practices should be adopted.<sup>6</sup> Kramsch, Aparna, and Degu take a linguistic approach to the geographic bounding of national cultures arguing that the insertion of migrant languages in Europe is weakening the link between language and territory as well as what they view as the inward looking and securitized concept of European territories.<sup>7</sup>

As the above brief discussion of some of the more recent literature suggests, scholars have taken wide-ranging approaches to look at European border management issues, but, as noted, the focus of scholarship tends to be more heavily weighted to the conceptual and theoretical aspects of the issue.

## Background

Border management in Europe is a curious amalgamation of international agreements, supra-state controls, and individual national policies. This reflects the tension in Europe between centripetal and centrifugal impulses that, on the one hand, pull EU member states closer together towards a common federative state and, on the other, assert the individual identity, sovereignty, and political autonomy of each of the nation-states that comprise the EU.<sup>8</sup> The European Union, which has its origins in the creation of the European Coal and Steel Community in 1950 and the European Economic Community in 1957, is based on efforts not only to pool Europe’s economic resources and encourage intra-European trade, but also to work

towards a federation of European states under a supra-national authority (a kind of 'United States of Europe') as a way of preventing the type of destructive European infighting that spawned two world wars.<sup>9</sup>

While the EU is still far from, and probably unlikely to ever become, a true federation, there are entire areas of public policy which have traditionally been under the purview of national governments and are now under the control of EU institutions. For example, since the EU member states form a single economy, the EU has the authority to regulate economic matters ranging from agricultural policy, banking, product standards, environmental protection, food and water safety, energy policy, trade agreements with non-EU countries, antitrust efforts, and a broad range of other matters.<sup>10</sup> In addition, for those nineteen countries that are members of the Eurozone, the EU has control over monetary policy, as these EU member states share a common currency overseen by the European Central Bank (ECB).<sup>11</sup>

The European Union operates via seven institutions: the European Commission, the European Parliament, the European Council, the Council of the European Union, the Court of Justice of the European Union, the European Court of Auditors, and the aforementioned European Central Bank. The Brussels-based European Commission is the executive/bureaucratic arm of the EU and is responsible for overseeing and managing the various EU areas of responsibility and on proposing legislation to the European Parliament (EP) and ensuring that EP laws are executed.<sup>12</sup> The Strasbourg-based European Parliament oversees budgets and passes legislation (based exclusively on recommendations from the European Commission) and members of the EP (MEPs) are elected by popular voting in districts of roughly equal size *in proportion to their respective populations* throughout the EU. This means that larger countries have a larger share of the seats – Germany with nearly 83 million people, has 96 MEPs (out of a total of 751), whereas Malta, with less than 500,000 citizens, has six MEPs.<sup>13</sup>

The Brussels-based European Council is a kind of coordinating policy shop consisting of European heads of government which usually meets four times a year to discuss and coordinate strategic policy. The Brussels-based Council of the European Union serves as the mechanism for the governments of EU member states to influence EU laws and policies.<sup>14</sup> The membership of the Council will vary depending on the policy issues being discussed (EU energy policy will be discussed and formulated by member states' energy ministers, agricultural policy will be discussed and formulated by agriculture ministers, etc.). The Council of the EU will vote on issues based on either a simple majority (15 member states voting in favor), a qualified majority (55 percent of the member states representing at least 65 percent of the total population of the EU), or unanimously.<sup>15</sup> The nature of the type of vote depends on the issue at hand. The voting system in the Council is supposed to strike a balance between the will of the majority populations in the EU (i.e., the large member states) and the interests of minorities (i.e., the small member states). Many crucial issues require a unanimous vote, including admitting new countries to the EU, and this accordingly gives even the smallest member states a veto over this process.

The European Parliament thus acts as the voice of the citizens of the member states (because it is directly elected by them) and the Council of the European Union acts as the voice of their respective governments – rather like the lower house of the German parliament, which represents the popular vote and the upper house, which represents Germany's state governments.

The European Parliament and the Council of the European Union together act as the main decision-making bodies of the EU.<sup>16</sup> The judicial branch of the EU is the Luxembourg-based Court of Justice of the European Union, which interprets EU law and settles legal disputes between member states. Finally, the European Court of Auditors ensures that EU funds are managed properly and the European Central Bank, as noted earlier, oversees monetary policy.

As far as border management issues are concerned, during the first decades of the existence of these European supra-national structures, borders between member states were policed and ports of entry controlled (though many goods could transit the borders free of customs duties) and thus border management issues were firmly within the purview of the respective member states, similar to the manner in which border management was handled within the North American Free Trade Agreement (NAFTA) and is now handled by its successor, the United States-Mexico-Canada Agreement (USMCA). Border management in Europe began to change in 1986 with the adoption of the *Single European Act* by the parliament of what was then the European Community (EC), another precursor to the European Union. Article 13 of the *Single European Act* called for the “...free movement of goods, persons, services, and capital...” across the borders dividing member states.<sup>17</sup> This was a landmark provision because it set the stage for the removal of border controls between at least some of the EU members, though at the time it was more of a statement of intent than a concrete policy change.

Alongside the strategic vision of a borderless Europe, a range of international agreements (bilateral, trilateral, and multilateral) were signed between various European countries within what was then the EC for the exchange of information between their respective police and intelligence agencies on trans-border threats, thus acting to tighten cooperation and coordination across national borders.<sup>18</sup> In addition, Belgium, the Netherlands, and Luxembourg, who had earlier created the Benelux Economic Union, had led the way in abolishing border controls between them in 1970 as part of this trilateral customs union. The success of the Benelux arrangement helped spur a broader multilateral agreement to abolish border controls between the Benelux countries and France and Germany. This multilateral agreement was signed in 1985 in the town of Schengen in Luxembourg and, upon implementation in its present form in 1995, brought about what is commonly referred to as the Schengen System, a framework that includes open internal borders between member states of the system (most of whom are members of the EU, though not all members of the EU are members of the Schengen system). By the mid-1990s, since the *Single European Act* called for open borders and since, in practice, open borders were being implemented via the multilateral (that is, between respective national governments) Schengen framework, it became necessary to create an affiliation between Schengen and the European Union’s legal and institutional framework, something that was accomplished via the *Treaty of Amsterdam* of May 1999. This, however, still left out a few loose ends given that some Schengen countries were not part of the EU (Norway, Switzerland, Iceland, and Lichtenstein) and some EU countries were not part of most or all aspects of Schengen (the United Kingdom, soon to be out of the EU, the Republic of Ireland, Romania and Bulgaria – the latter two due to persistent concerns about the rule of law in these countries). In a nutshell, the various agreements that have been signed over time and that collectively make up the current Schengen system not only removed border controls between Schengen Area countries, but also created common border controls, procedures, and information-sharing at ‘external borders’, that is, non-Schengen land borders, maritime borders, and all ports of entry from non-Schengen Area countries (air, sea, and land). The Schengen system does not,

however, eliminate border controls completely between its members as the agreements include provisions for temporarily reinstating national border controls in the event of crises or during major national events (sporting events, commemorations, etc.).

Within the sphere of immigration issues, the Schengen Area countries also agreed to create a common short-term visa for visitors coming from outside of the Area. Aside from these short-term visitors, immigration law and policy regarding non-EU and Schengen country citizens has remained firmly within the purview of the individual member states, though they have agreed to common standards regarding the reception and processing of asylum-seekers. As far as the combatting of smuggling, human trafficking, and cross border-related terrorism, the EU and Schengen frameworks provide for common databases (the Schengen Information System, version II, and the Visa Information System) to track all people entering and leaving the Schengen Area and to deny entry to individuals at one country's external border who have previously been denied entry at another country's external border (or to apprehend those for whom a European Arrest Warrant has been issued).<sup>19</sup>

Finally, in terms of coordination and cooperation, EU countries with external land and/or maritime borders can call on border security aid from other EU countries within the framework of the European Border and Coast Guard Agency, previously the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (known as Frontex and established in 2004). The new European Border and Coast Guard Agency (still known as Frontex) helps design common training standards and carries out assessments and risk analyses. The agency also has the capacity to provide member governments with Raid Border Intervention Teams (RABITs) - teams of border guards from other EU countries to deploy at an external Schengen border in order to assist a member state facing challenges to securing its border. Moreover, the EU's 1990 *Dublin Convention* and 2003 *Dublin II Regulation*, allow for cross-border surveillance, cross border hot pursuit, and faster extradition between member states.<sup>20</sup>

The discussion above provides a snapshot of Schengen and EU rules and policies that evolved over decades. In the wake of 2015, which constituted the start of Europe's worst migration crisis since World War II, a number of Schengen/EU countries began to question the desirability of free movement of persons within the Schengen Area and, at least at the present, political trends suggest that we are likely to see a return to more restrictive European border management policies and a weakening of the Schengen system.

## Control of Borders and Ports of Entry: Migration Pressures on Schengen

Some of the first storm clouds that suggested that all might not be well within the Schengen Area appeared on 15 April 2011 when a Franco-Italian row broke out over migrants. At that time, a large group of approximately 25,000 Tunisians arrived by sea to the Italian island of Lampedusa (situated near the Tunisian coast) requesting asylum. Under EU rules (the *Dublin Regulation*), asylum-seekers are required to stay in the first EU country they set foot in and apply for asylum there. The host country is expected to feed, clothe, and house the migrants

and process their asylum applications, thereby determining which individuals are eligible for asylum and thus to be accorded refugee status and which individuals are economic migrants who are eligible to be deported.<sup>21</sup>

From an EU-wide perspective, the problem with these rules is that most EU countries do not border on areas that are crossing points for large numbers of asylum-seekers, and this means that countries such as Spain, Italy, and Greece have to deal with an inordinate amount of migrants and thus are required to shoulder much of the cost of providing for these migrants and processing their applications. In April 2011, the Italian government balked at having to shelter and feed some 25,000 individuals and decided instead to facilitate their movement to other parts of the EU where they could presumably apply for asylum. The Italian government consequently issued the migrants with a temporary 'humanitarian passport' and released them to move further into the Schengen Area. Not surprisingly, France, Belgium, and Germany protested the Italian measure and argued that Italy was violating common EU rules with respect to dealing with asylum-seekers.<sup>22</sup> Two months later, France temporarily re-established border controls at its border with Italy and stopped Italian train traffic into France for six hours. While the crisis was ultimately resolved fairly quickly, it portended future problems because, in part, EU countries without external Schengen borders did not have to deal with masses of migrants, at least at the time. The French were technically within their rights in deciding to temporarily close the border since the *Schengen Borders Code*, as constituted at the time, allowed for any country to impose temporary border controls for up to six months in the event of a threat to "public policy or internal security."<sup>23</sup>

France's decision to temporarily close its border in 2011 may have been the impetus for the promulgation of Chapter II, Article 26 of the 2016 version of the *Schengen Borders Code*, which stipulates that "migration and the crossing of a country's borders by large numbers of third-country nationals should not, per se, be considered to be a threat to public policy or internal security."<sup>24</sup> However, since the new version of the *Schengen Borders Code* still allows countries to close borders temporarily for security reasons, in some cases migrant traffic has simply been reclassified as a security threat. Eventually, the EU member states recognized that the *Dublin Regulation* was inherently unfair and placed a disproportionate burden on a handful of southern European countries that received the overwhelming majority of migrants. In 2016, the EU's executive arm, the European Commission, proposed a mechanism to allow a percentage of asylum-seekers to move to a less-burdened EU country and apply for asylum there in the event that a given country was overburdened with a large flow of migrants. This measure was not without controversy and opponents of this scheme felt that requiring them to accept migrants was a gross infringement of national sovereignty and it was up to the individual member states to decide whether or not they wanted to open their borders to migrants.<sup>25</sup> Ultimately, this issue remains to be decided but it has contributed to disillusionment with the EU in several eastern European countries including Poland, the Czech Republic, Slovakia, and Hungary.<sup>26</sup>

The Schengen system was further tested with the massive surge in migration and asylum applications from the Middle East and North Africa in 2015. That year there were over 1.2 million new asylum claims (by contrast, in 2018, there were just over 635,000 new asylum claims across the EU) with just over one million of these migrants accessing the EU by sea via Greece, Italy, or Spain.<sup>27</sup> In response to the surge of migrants entering central Europe via Greece



and the Balkans, the majority of EU/Schengen countries elected to reestablish border controls on their internal Schengen borders. Germany re-imposed border controls on its border with Austria in September 2015, followed quickly by Austria reestablishing border controls on its borders with Italy, Hungary, Slovenia, and Slovakia. In response Slovenia and Hungary imposed border controls on their respective southern borders. By mid-2016, Sweden, Norway, Denmark, Belgium, and France had all joined the list of countries re-imposing temporary border controls on their internal Schengen borders. Since then, these countries have all alternately imposed and then removed 'temporary' border controls, presumably to slow the flow of migrants. Given that Article 26 of the *Code* no longer allows the prevention of cross-border migrant flows to be cited as justification for re-imposing border controls, these moves are characterized, as noted earlier, to be designed to thwart security threats from "significant secondary movements," which refers to the movement of migrants from the country in which they are seeking asylum to another country.<sup>28</sup>

At present, the future of a Europe without more or less permanent internal border controls is open to serious question. An analysis by Tobia Etzold and Raphael Bossong of the German Institute for International and Security Affairs, suggests that border controls within Europe are likely to become permanent, though the nature of these controls and the degree to which they are felt varies as some countries engage in random checks, others operate border checks at a limited number of crossing points, and others employ license plate readers and other technology that creates lower profile border control checks.<sup>29</sup> While some efforts are afoot to prohibit Schengen countries from repeatedly extending six month 'temporary' border controls and to limit such measures to one year, this is unlikely to be acceptable to some of the major Schengen signatories and they could take back border security functions on the grounds that national security issues are ultimately under the purview of EU/Schengen member states and not the EU as a whole.<sup>30</sup>

Germany, arguably the most critical member state of the EU, has provided a potential indication as to the direction the political winds are blowing regarding maintaining border controls as the coalition agreement that was signed in early 2018 reaffirms the country's 'right' to establish border controls until the EU comes up with a more stringent policy with respect to the Schengen external borders and the distribution of asylum-seekers across the EU.<sup>31</sup> As noted earlier, Germany is not alone as a number of other EU countries have re-established border controls of various kinds, in order to combat illegal migration and terrorism threats, and these measures appear to be politically popular among at least a significant minority.

According to a December 2018 study published by the European Commission, only 55 percent of respondents viewed the Schengen Area as a contributor to security, with 30 percent of respondents believing it harmed security and 15 percent unsure of whether or not it was beneficial for security.<sup>32</sup> European politicians will likely need to take into account this rather large minority of European citizens who believe Schengen arrangements harm security or may harm security and this is likely to mean that they will want to curb the traditional freedom of movement across internal Schengen borders on a more permanent basis. At the same time, three-quarters of respondents in the aforementioned European Commission poll recognize that the Schengen Area has brought significant economic benefits to Europe.<sup>33</sup> European politicians will have to navigate the desire for greater security and the curbing of migration among sizeable

chunks of their respective populations with the clear desire of the majority for maintaining the economic benefits of Schengen. This is likely to necessitate some sort of compromise that will avoid the permanent re-establishment of border controls on internal Schengen borders with cameras with license plate readers at border crossings, police checkpoints inside the member states, and the random re-establishment of full border controls for different border crossings and at different times. European officials will doubtless be interested in looking at the operation of the border crossings to be established between Northern Ireland and the Republic of Ireland in order to determine if this can be a test case for the use of technology and other measures to facilitate smooth border crossing (or not, as the case may be).

There is no indication that the two issues largely driving the desire to re-establish border controls within Schengen, namely terrorism and migration, are likely to go away. Terrorism typically ebbs and flows, but there is no evidence that Europe has ceased to be a target of Jihadist and other groups from outside the EU. As far as migration pressures are concerned, while migrant numbers coming from the Middle East do not currently reach the levels of the 2015 crisis, the continued economic and social problems in Afghanistan, Iran, and Iraq, are likely to ensure migratory pressures from those countries. In addition, millions of Syrian refugees in Turkey, Jordan, Lebanon, and internal refugees in Syria itself, are unlikely to be repatriated in the near term and thus are likely to ensure continued pressure for migration to Europe. As Turkey is generally the gateway for such migrants into the Schengen Area, much of the post 2016 reduction in refugee flows from the Middle East could be attributed to the March 2016 agreement between Turkey and the EU on readmitting migrants arriving on Greek islands in the Aegean. In July 2019, Turkey announced that it would no longer abide by the terms of the agreement and while it has been coaxed back to the agreement, there can be little doubt that EU member states cannot rely on this agreement staying in place forever.

Moreover, at least to some degree, the closing of the Aegean route has led migrants from the Middle East to try and access the Schengen Area via highly risky Mediterranean crossings from North Africa to Spain and Italy.<sup>34</sup> In addition, population growth and youth bulges in sub-Saharan Africa, as well as the chaos in Libya, have resulted in increasing waves of African migrants – with the number of migrants trying to travel to Europe more than doubling between 2010 and 2017.<sup>35</sup> In short, the main drivers for the re-establishment of permanent internal border controls in some form are not likely to go away.

## Management of Migration

Unlike many areas of economic activity and regulation, immigration matters are largely, though not exclusively, under the purview of the member states of the European Union. This should not come as a surprise as the power to determine citizenship status is one that lies at the root of the concept of national sovereignty and member states are understandably loathe to concede this authority. Nevertheless, over the years EU member states have conceded some aspects of immigration law and policy to EU institutions. For example, as noted earlier, temporary access (for tourists and other short-term visitors) is granted across the Schengen Area via the issuing of a common visa (commonly referred to as the 'Schengen Visa') provided by the country that serves as the first port of entry for non-Schengen Area citizens. In addition, under Title III of the 1957 *Treaty of Rome*, every member state of the EU must allow citizens of every other member

state to live and work in the country.<sup>36</sup> Indeed, the United Kingdom, which is not a member of the Schengen area and thus does not accept Schengen Visas, has long been unhappy with the aforementioned free movement of workers provisions of the European Union and the fact that citizens from other EU states have been able to work and reside freely in the UK has been one of the bones of contention motivating the British decision to leave the European Union.<sup>37</sup>

In addition to visas and residence by citizens of other EU states, members of the EU are bound by the 1951 United Nations *Convention and Protocol Relating to the Status of Refugees* (Refugee Convention), which, under the principle of '*non-refoulement*', prohibits countries from repatriating persons granted refugee status (i.e., those who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion..."<sup>38</sup>), as well as the *Treaty of Rome*, the *EU Charter of Fundamental Rights* (EU Charter) and the *Maastricht Treaty*. Since 2013, EU member states have been bound by the current version of the *Asylum Procedures Directive* (APD), in terms of receiving and assessing applications for asylum (with the exception of the United Kingdom, Ireland, and Denmark, who opted out from all or some measures of the current APD – at the time of this writing, the UK was still part of the EU). Creation of a common asylum process was designed, in part, to prevent the movement of asylum applicants (referred to, as noted above, as "secondary movements") from one EU member state to another in search of more favorable conditions for applying for asylum.<sup>39</sup> The APD governs the determination as to which member state will consider a given asylum applicant (as noted earlier, this means, in most cases, the first member state that the applicant sets foot in), the processing of individual asylum applications, and the appeal procedures.<sup>40</sup>

The standardization of processes for assessing asylum applications and the adherence to the principle of *non-refoulement*, does not necessarily imply that the European Union and its member states have a clear understanding of what it can and cannot do with respect to applicants who may have been foreign fighters, involved in terrorism, or having been engaged in serious crime. According to Article 33 of the UN Refugee Convention, the principle of *non-refoulement* does not apply to individuals who threaten national security and/or have been convicted of a serious crime and are deemed to constitute a threat to the public. At the same time, the EU Charter considers *non-refoulement* to be an inalienable right, irrespective of that individual's background and the threat he/she poses.<sup>41</sup> The prohibition on sending a migrant whose asylum application has been rejected on the grounds that he/she poses a threat to public safety (or on any other grounds for that matter) back to their country of origin where it is reasonably likely that this individual will face persecution does not mean that he/she will be allowed to stay in an EU member state. Deporting a migrant whose asylum application has been rejected to a third country where he/she is not expected to be persecuted is not generally considered to be a violation of the principle of *non-refoulement*. Accordingly, in 2016, the European Union created a partnership framework with third countries in Africa and the Middle East as well as a range of bilateral treaties to allow for resettling migrants not granted refugee status in those countries as well as blocking the flow of migrants to Europe.<sup>42</sup>

Beyond the issue of adhering to common asylum procedures and standards, as well as commitments under the UN Refugee Convention, EU member states are free to determine immigration and naturalization policies. Most EU member states require that immigrants

applying for citizenship: possess knowledge of the relevant language, show some understanding of the legal and political system, demonstrate appropriate behavior (e.g., no criminal record, continuous employment records, etc.), and demonstrate a willingness to integrate and accept the values of the larger society.<sup>43</sup> In terms of the waiting period required before a permanent resident can be naturalized, there is considerable variability across European countries.

In Austria, Italy, and Spain, the waiting period is ten years whereas Germany requires that applicants for citizenship reside in the country as permanent residents for at least eight years and France, the Netherlands, Sweden, and the Czech Republic require a waiting period of only five years. No EU country grants automatic citizenship to children born in the country to foreign citizens, but some EU member states allow children to receive citizenship upon birth if the parents have legally resided in the country for a period ranging from three to ten years.<sup>44</sup>

Removal of citizenship also falls within the purview of individual European countries and can be the result of an individual voluntarily renouncing citizenship, fraud relating to the naturalization process, prolonged residence abroad, or service in a foreign army. A number of EU countries also allow for the revocation of citizenship due to treason or disloyalty. This can cover serious crimes (Netherlands, Belgium, Denmark, Bulgaria), acting against the constitution (Estonia, Latvia, Lithuania, France, Denmark), demonstrating disloyalty (Ireland, Cyprus, Malta), undermining national interests (France, Greece, Romania, Slovenia, and the UK), and/or involvement in terrorism activities (France, the UK, and the Netherlands).<sup>45</sup> Overall then, immigration matters are largely the purview of individual European countries, though they are more limited in their ability to act autonomously with respect to international conventions and EU rules regarding migrants applying for asylum. However, given that immigration policy has become a major issue in Europe and helped lead to the formation in Hungary, Poland, Austria, Italy, Denmark, the Netherlands, and elsewhere in the EU, of governments largely hostile to immigration, this suggests that it is highly unlikely that EU member states will create common immigration guidelines and policies outside of those already in existence for asylum-seekers.<sup>46</sup> However, the reality of the situation, as far as immigration is concerned, is that the bulk of migrants try to claim formal refugee status via applying for asylum, and therefore the member states are limited in their abilities to develop and implement their own policies at a time when the public is increasingly backing national politicians that want to halt the flow of migrants. While this has not yet led to serious calls to withdraw from the common asylum policy, it has led to attempts by member state governments to modify the shared asylum policy.<sup>47</sup> It is likely that as long as the EU modifies its asylum policies to be in keeping with the demands of its national governments, the system will survive. If it fails to do so, however, this risks the withdrawal (or refusal to accept) by member states from the provisions of the ADP (as has previously been done by Ireland, the UK, and Denmark). Indeed, as noted earlier, rejection of the EU's various rules and policies with respect to the free movement of persons across borders played a large role in the United Kingdom's decision to withdraw from the European Union and there have been calls by populist politicians elsewhere in Europe, such as Marine Le Pen in France, to withdraw from the EU for similar reasons.<sup>48</sup>

As with the issue of re-establishing border controls at internal Schengen borders discussed earlier, the main drivers behind limiting the freedom of movement across borders, terrorism and fear of waves of migrants, are likely to also impact immigration policy in the respective member states. We have already seen a tightening of immigration requirements for non-asylum seekers



and EU institutions have been under considerable pressure to reform the common asylum system. At present the European Council is considering seven legislative proposals made by the European Commission to reform the asylum system and, in so doing, perhaps assuage the primary concerns voiced by member states who fear the current system does not adequately process asylum-seekers and repatriate those who do not meet the threshold. The proposals include a reforming of the Dublin system so that asylum applicants are more equitably distributed among member states rather than being forced to claim asylum in the first EU country to which they arrive, creating an EU asylum agency to be responsible for common modes of assessment for asylum applications, initiating common asylum processes and procedures (including stricter rules to prevent abuse), and establishing common rules for resettling refugees in the EU and internationally.<sup>49</sup> While it is too early to determine whether these latest proposals will be deemed acceptable to all the member states, it seems likely that if the EU does not fix its common asylum policies, the member states will take back this aspect of their respective national sovereignty as some of them are now doing with respect to border controls. After all, if the objective is to have better control over who is present in a member state's territory, border controls will be less effective if individuals deemed to be either a threat or an economic migrant are able to live and travel in the member state due to EU asylum policies.

## The EU Role in Combatting Cross-Border Threats

As with immigration issues, efforts to combat cross-border threats and illegal activities in Europe are based on an amalgamation of EU-wide mechanisms, national-level measures, and arrangements between EU member states. Given that control of borders is a major factor in establishing territorial sovereignty and ensuring security for a country's citizens, national governments in the EU have endeavored to preserve their respective monopolies over this issue. At the same time, due to Schengen, internal EU borders cannot be treated like an external border (and some EU countries, like Germany, do not currently have external Schengen land borders). On the other hand, the agencies responsible for coping with cross-border threats such as smuggling, human trafficking, and international terrorism, are national agencies because they gather intelligence or enforce laws and these functions lie very much within the scope of the authority and legal frameworks of the member states, not the EU itself.

The European Union's role in combatting smuggling, human trafficking, and cross-border terrorism focuses primarily on information-sharing and coordination of actions and efforts between member states. In terms of information sharing, the most important information-sharing mechanism currently in use is the aforementioned Schengen Information System, version II (SIS II). SIS II is a common IT system that allows national policing, border control, customs, citizenship, vehicle registration, and judicial entities to share information on suspects and contraband. Member states share information on criminal suspects (accused of serious crimes), those denied access to the Schengen Area (or deported from it), missing persons, known cases of identity fraud, and individuals who have been subpoenaed or otherwise required to appear in court, as well as stolen vehicles, firearms, equipment, documents, credit cards, and other items.<sup>50</sup> SIS II works by providing 'hits' (alerts) regarding these persons or items that are accessible to the aforementioned national authorities operating internally and at the

external borders and ports of entry into the Schengen Area (including airports and seaports). Each member state is responsible for operating its own national database as well as a national SIRENE (Supplementary Information Request at the National Entries) bureau that is responsible for around-the-clock coordination of information on alerts, including providing supplementary information, validating the identity of wanted persons, contacting member states when an arrest or other action has been taken on a hit, and other related activities.<sup>51</sup>

A second mechanism for information-sharing within the European Union is handled by the previously mentioned European Border and Coast Guard Agency (Frontex). Frontex provides risk analysis and the overall intelligence picture relating to smuggling, human trafficking, terrorism, and other border security threats to member states based on reports made to it by law enforcement, intelligence, and other agencies of member states via the Frontex Risk Analysis Network (FRAN). FRAN indicators include information on illegal border crossings, refusals of entry, detections of fraudulent documents, individuals overstaying visas, deportations, asylum applications, and other data.<sup>52</sup>

A third EU mechanism for information-sharing is Europol, the European Agency for Law Enforcement Cooperation. While law enforcement is a national function within the EU, Europol serves as a kind of clearing house/fusion center for the sharing of intelligence and other information across EU member states and, via bilateral cooperation agreements, with sixteen non-EU countries as well as international organizations such as Interpol. Europol assists a range of national law enforcement agencies including those dealing with immigration, border security, financial crimes, terrorism, organized crime, and other areas. In addition to facilitating the exchange of information, Europol provides analysis and support for operations, technical expertise, and generates strategic threat assessments.<sup>53</sup> Europol operates a number of internal analytical centers including the European Cybercrime Center, the European Counter Terrorism Center, and the European Migrant Smuggling Center.

Eurojust, the European Union Judicial Cooperation Unit, is yet another coordinating mechanism. Created in 2001, Eurojust helps foster coordination and assists in investigations and prosecutions across multiple EU member states. The agency may request a member state to investigate or prosecute a criminal act, may facilitate the creation of joint investigative teams across member states, may help determine in which member state it may be more fruitful to prosecute criminal activity that occurs across member states, and may assist Europol in its information-sharing and support functions.<sup>54</sup>

Under the 'Solidarity Clause' of the *Treaty on the Functioning of the European Union* (TFEU), member states can request immediate EU assistance during crises. The EU can provide teams of law enforcement officers from other member states. As previously mentioned, in the area of border security, Frontex can provide RABIT teams from other member states, and the same approach can be used to put together Joint Investigative Teams (JITs), engage in Joint Customs Operations (JCOs), and engage in common financial crimes investigations using joint Financial Intelligence Units (FIUs).<sup>55</sup>

In short, there are multiple mechanisms in place on the part of the European Union to facilitate the combatting of cross-border threats. Naturally, here too there are fissures between certain member states and the EU. Of the many factors motivating the British withdrawal from the EU,

one of them had to do with the British government's refusal to adhere to the strict rules for data protection employed by EU institutions.<sup>56</sup> Nevertheless, while there is no indication that cooperation on the part of member states via these EU platforms, institutions, or frameworks presents a problem in the way that common approaches to coping with migrants or open internal borders currently do, the upcoming British withdrawal from the European Union is expected to disrupt information-sharing and cooperation between the EU and the United Kingdom, though it is unlikely to fundamentally alter the existence or functioning of these EU mechanisms.

## CONCLUSION

The European Union plays a critical role in border management in Europe and, taken as a whole, the Schengen Area arguably constitutes the world's most extensive and complex border management regime. As in many other areas of public policy, border management has come increasingly under the authority of EU institutions as the European Union has grown stronger at the expense of individual national governments. Not surprisingly, the increase in EU power and authority has also led to more calls for limiting, if not rolling back, the supra-national entity's powers and reasserting national sovereignty in the member states. Over the last two decades, the EU has faced significant challenges in maintaining the stability of the Euro, coping with the global financial crisis of 2007-2008, fending off economic nationalism (i.e., moves toward greater economic independence) - particularly in some of its larger member states, maintaining stable trade ties with the United States, China, and Russia, and, of course, coping with a wave of migration. These challenges have taken their toll on the EU with the most dramatic manifestation of their negative impact being the United Kingdom's decision to withdraw from the European Union. BREXIT has precipitated what is arguably the greatest crisis the EU has faced since its founding, as the European Union is about to lose a member state with significant global clout and the second or third largest economy in the EU (depending on how one measures the size of the economy).

As noted earlier, other countries are also not immune to these centrifugal forces, though there is no indication at present that any other member state is seriously considering leaving the EU. It may be the case, however, that preventing a future erosion of the EU may require modifying paradigms in a variety of legal and policy areas and border management appears to be one of these. While there is no sign that EU institutions, platforms, and mechanisms for border management, particularly with respect to cross-border threats such as smuggling, human trafficking, and cross-border terrorism, will be significantly modified, the paradigm is changing with respect to the Schengen internal borders, the free flow of persons and goods, and the handling of migration and asylum. While it is impossible to predict what the paradigm in these areas will look like, current trends do seem to point in the direction of some degree of permanent border controls on internal Schengen borders, perhaps highly technology-based to minimize the feeling of crossing a border for those doing so - in this context it will be interesting to see how the British and Irish governments (with the blessing of the EU in the case of the latter) try to avoid recreating a 'hard border' around Northern Ireland and it looks likely that they will do so via creating a customs border between Northern Ireland and the mainland UK. Likewise, fears of migrants (both in terms of volume and in terms of potential radicalization) are leading to attempts to rework EU asylum processes to provide national governments with more control over who is admitted to their respective territories. Thus, in this area as well, the paradigm is shifting towards

more member-state control, or may do so in the area of asylum if the EU fails to come up with reforms that are acceptable to its member states. All of this does not suggest that somehow the European Union's days are numbered. The EU provides significant benefits to its members that likely outweigh its limitations, even in terms of border management issues. The public in Europe and mainstream politicians (with the prominent exception of the UK) continue to be supportive of maintaining the EU. Thus, while parts of the border-management paradigm are shifting, in some cases in fairly dramatic ways, the EU, with its laws, institutions, policies, and the common European identity that it helps foster, is not likely to disappear.

The changes that are occurring in Europe with respect to the control over borders and the management of migration are indicative of more general trends in the developed world. In their own ways, other developed countries outside the EU are also struggling with both issues and are establishing policies to better control land, air, and maritime borders as well as to restrict migration. The United States, for example, has seen both a dramatic increase in apprehensions along its southwest border (almost a million in 2019, more than double the number of apprehensions in 2018 and triple the apprehensions in 2017<sup>57</sup>) and has toughened rules for asylum-seekers. Asylum-seekers coming from Central America into the US via Mexico are now denied the ability to claim asylum in the US and must request asylum in Mexico or elsewhere (though ongoing litigation could change this rule).<sup>58</sup> Australia, though with fits and starts, has employed a foreign outsourcing of asylum-seekers known as the 'Pacific Solution' and has unequivocally denied asylum to anyone arriving illegally by sea. Other developed countries with tough immigration and asylum policies include Japan, South Korea, and Israel. In short, the changes we are witnessing in Europe are part of a larger global trend driven not only by security concerns and fear of terrorism, but also, and perhaps primarily, by demographic growth in poor countries that is leading to waves of migrants and the attendant fears that unfettered migration will lead to unwanted social and economic changes (though, of course, fear of negative changes due to migration is not, by any means, new). Demographic projections indicate that most of the world's demographic growth well into mid-century will be occurring in the developing world, particularly sub-Saharan Africa, and given the likelihood that these countries will be unable to provide for burgeoning populations (due, in part, to increasing food and water insecurity resulting from climate change), this suggests that migration pressures from poor countries to rich countries will grow and trigger greater resistance in rich countries. We are thus already in an era of retrenchment in which the free movement of persons that characterized the era of globalization of the mid-20<sup>th</sup> century to early 21<sup>st</sup> century will be more limited.

For the United States, some of the policy challenges facing the EU as discussed above hold potential lessons. Naturally, the United States is one country, state lines are not international borders, and the federal government has formal authority over border security and immigration policy. Yet the federal government often relies on state and local authorities to assist in law enforcement and provision of services along the border and in dealing with migrant populations inside the country. Some elements of the aforementioned collaborative frameworks created by the European Union to enhance cooperation between member states, as well as between member states and EU institutions, could be modified and translated to cooperation between states (particularly during periods of intensive influx of migrants when a state's authorities might be overwhelmed), between state and local authorities in a given state, and between federal authorities and state and local authorities. The kind of information-sharing, task forces, and mutual-aid agreements seen in Europe may, with modification, improve the



functioning of the border security and immigration system in the U.S. Similarly, some of the approaches to asylum and immigration across the EU could, with modification, possibly inform US policy, particularly if the federal government were to allow states to have more influence in determining where refugees are resettled or in seeking out new immigrants with specific skills. Of course, as the Europeans have shown, truly effective border security and immigration policies are aspirational, but concrete lessons have been learned and many of these could potentially inform U.S. policymakers. In short, as far as this and other aspects of the homeland security enterprise are concerned, there is a wealth of knowledge and experience outside the United States and some of it may be useful, with the appropriate adaptations, in informing American policy makers and improving policy.

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# Endnotes

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